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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 62

JOHN A. GROSFIELD AND RICHARD CAPLIS

v.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF ON BEHALF OF THE UNITED STATES

OPINIONS BELOW

This case comes before the Court on certificate from the Circuit Court of Appeals for the Sixth Circuit. The decision of the District Court was not reported.

JURISDICTION

Jurisdiction is conferred upon this Court by Section 239, Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS CERTIFIED

The Circuit Court of Appeals certified the following questions:

> 1. Is the intent of Section 22, Title II, to authorize a court of equity to close for a year,

"or until otherwise ordered by the court," premises from which the landlord has ousted the offending tenant, and this in a case where the landlord had terminated the lease promptly after he first knew or was chargeable with notice that the tenant was using the premises for the manufacture or sale of intoxicating liquor?

2. If the first question is answered in the affirmative, then was such section in this particular a constitutional exercise of the legislative power?

STATUTES INVOLVED

The statutes here involved are set forth in the appendix to this brief.

STATEMENT

The facts in this case are set out in the certificate, pages 1 and 2, as follows:

> Appellants own premises in the business district of Detroit consisting of a store building and in the rear a connected building suitable for garage and warehouse purposes. They rented the entire premises to Silverman for a wholesale grocery, and he used the rear building for storage. During this tenancy the prohibition officers found a still in operation on the second floor of the rear building. This proceeding was thereupon commenced by the filing of a bill against the tenant and the landlords, asking that the nuisance be abated. The landlords thereupon, and before this matter came on for

hearing, ousted the tenant and rented the rear building to a new tenant for legitimate purposes.

Upon the hearing of this matter the landlords offered to show that they had no participation in nor knowledge of the unlawful use by Silverman and had no reason to be put upon notice that Silverman was permitting or causing any such unlawful use—in other words, that they acted entirely in good faith in renting to him and had no reason to believe anything wrong until learning of the discovery of the still, and that they thereupon ousted their offending tenant.

The District Judge considered that this offered testimony was immaterial, refused to permit the testimony, and entered an order that the rear building was a common nuisance as defined in Title 2 of the National Prohibition Act; that the nuisance be forever abated; "that said real estate shall not be occupied for any purpose for the period of one year from the date of this decree or until the further order of this court herein, commanding and directing that all persons be prohibited from entering in or upon said premises for the period of one year from the date of this decree, or until the further order of this court herein; and further commanding and directing that all persons be prohibited from taking away, moving, or in any manner interfering with the contents of said premises." It was further ordered that the Marshal "close the said premises for use or occupancy for the period of one year."

It is contended by the United States that the order was justified under Section 22 of Title 2 of the National Prohibition Act; it is contended by appellants that since, under Section 21, the premises could not even be subjected to a lien for costs unless the landlords had knowledge or reason to believe that the building was being unlawfully used, Congress could not have intended to subject his property to the more complete forfeiture of Section 22, in the absence of such knowledge or reason to believe; and that if Section 22 is to be considered as intending to give the power here exercised the appellants' property is taken without due process of law.

SUMMARY OF ARGUMENT

The District Court correctly interpreted Section 22, Title II, of the National Prohibition Act, as requiring a literal application. This is shown by the language of the statute itself, which is to the effect that it shall not be necessary for the court to find that the property involved was being unlawfully used at the time of the hearing on the Government's petition for an abatement of the nuisance, but on finding that the material allegations of the petition are true the court shall issue an abatement order, and in addition thereto may order the premises closed for a year, or issue such other incidental orders as in its discretion it may deem necessary to make the abatement order effective. The trial judge accordingly held that appellants' attempted showing of a lack of knowledge

of the existence of a nuisance and of their ouster of the offending tenant since the filing of the Government's suit was immaterial to the issue then before him, which was whether a nuisance existed as alleged in the petition. The court's jurisdiction to issue the abatement order and all incidental orders following thereafter rests upon the conditions existing at the time the bill was filed. Anything occurring between that time and the time of final hearing becomes, as the statute declares and the trial court held, immaterial to the basic inquiry.

Appellants' claim that a nuisance no longer existed to abate refers to the time of hearing and not, as the statute contemplates, to the time the petition was filed. The existence of a nuisance having been found by the court on evidence which must here be deemed to have been sufficient, it was bound under the statute to abate the same, and to this end it could close the premises for a year or exact a bond for their lawful use if in its discretion it considered such action necessary to the effective enforcement of the abatement order. Moreover, the ouster of an offending tenant and the securing of a new lessee may not be a sufficient guarantee against the evils sought to be remedied. Other steps may be necessary to a complete abatement of the nuisance, since the purpose of the statute is not only to stop the nuisance but to prevent a recurrence of the offensive conditions.

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To adopt appellants' contention would call for a continual policing of the premises involved and bring about a multiplicity of suits, which apparently it was the purpose of Congress to prevent. Furthermore, the statute provides a mode of relief, available to appellants, from the burdensome effect of a closing order.

That Congress intended a literal interpretation of the statute, as applied by the trial court, is plainly shown by the legislative history of the act and finds ample support in Federal and state court decisions.

So construed the statute is not an unconstitutional exercise of legislative power. It in no sense involves a taking of property without due process. It is but the exercise of a power, now well recognized as existing in Congress, to adopt such means as are reasonably necessary and appropriate to carry out the constitutional mandate and the enforcement statute.

Both questions certified should be answered in the affirmative.

ARGUMENT

I

Nature of questions certified

The questions certified in this case go one step farther in probing the intent of Congress in the nuisance sections of the National Prohibition Act than the one propounded by the Circuit Court of Appeals for the Third Circuit in *Murphy* v. *United*

States, 272 U. S. 630, decided by this Court last term. In the *Murphy case* it was held that an acquittal under Section 21, whose object is to punish, did not preclude a court of equity from proceeding on the same facts under Section 22, because the object of the latter section is to protect the community by removing an offending condition, and financial loss which may result to an owner of the premises, personally innocent of wrongdoing, from padlocking the place does not change the essential objects of the statute from abatement to forfeiture, the right of the court to order the place closed for a year being but an incident to the general duty to take such steps as appear necessary to insure a restoration of the premises to lawful use.

Here the inquiry is whether Congress could have meant that a court should order the premises closed for a year if the owner has terminated the lease of the offending tenant by the time the injunction suit comes on for hearing. Yet the statute so provides, and all that the District Court did in this case was to follow the statute literally. Doing so, however, appellants argue, was taking a "useless, unreasonable, and inequitable action," one that in spite of the words used, Congress could not have intended. Although it would seem that therein lies their real grievance, appellants fail to charge that the trial court abused his discretion. They rest their claim to reversal on urging a more lenient interpretation than the literal meaning of Section 22. The real

consideration is, therefore, whether Congress meant exactly what it said in Section 22, or something less.

II

Section 22 requires a literal application

Condensing relevant portions, Section 22 reads:

> If it is made to appear by affidavits or otherwise, to the satisfaction of the court, * * * that such nuisance exists, a temporary writ of injunction shall forthwith issue restraining the defendant from conducting or *permitting the continuance* of such nuisance until the conclusion of the trial. * * * It shall not be necessary for the court to find the property involved was being unlawfully used as aforesaid *at the time of the hearing*, but on finding that the material allegations of the petition are true, the court *shall* order that no liquors shall be manufactured, sold, etc., * * * in such * * * place * * *. And upon judgment of the court ordering such nuisance to be abated the court *may* order that the * * * place shall not be occupied or used for one year thereafter; but the court *may, in its discretion,* permit it to be occupied or used if the owner * * * shall give bond * * * conditioned that intoxicating liquor will not thereafter be manufactured, sold, etc., thereon, and that he will pay all fines, costs, and damages that may be assessed for any violation * * * upon said property. (Italics ours.)

(A) Power of the court before hearing on the merits

Plainly the statute intends that as soon as suit is filed, before trial, the court may restrain the own from "*permitting*" the continuance of the nuisance. The choice of that word could mean nothing less than the right to order a landlord to discipline or get rid of an offending tenant or employee pending a hearing on the merits of the injunction. Whether such preliminary order was issued in this case is not revealed by the brief statement of facts, but one would assume that it was not, since appellants claim all the credit for ousting the tenant Silverman and urge that thereby they "voluntarily" abated the nuisance, and the statute did not intend that the court should proceed thereafter. It is unlikely, however, that Congress would divest the court of power to go further in the various steps of Section 22 if the landlord acted *without* specific order, when before notice or hearing the court might have compelled the very action taken by defendants here as a mere preliminary step in the proceedings. Moreover, the claim that ousting Silverman was voluntary is unfounded. It was not done until after suit was commenced and the landlords were made parties defendant.

It is, of course, well settled that when a nuisance has been abated or suppressed, by the parties themselves charged with maintaining it, prior to the commencement of the action to abate, the prosecution of such action can not be continued. Joyce on Nuisances, Section 486; Wood on Nuisances, 2d Ed.,

Section 864. But the rule is limited to a time prior to commencement of proceedings. *Saunders* v. *State,* 66 N. H. 39, 84; *State* v. *Strickford,* 70 N. H. 297. An abatement by the parties after the issuance of a temporary injunction and before trial on the merits is too late. *Drummond* v. *Drug Company,* 133 Iowa, 226. Furthermore, the abatement must be voluntary and in good faith. *Eckert* v. *Davis,* 75 Iowa, 302. And it is not voluntary when the abatement comes after the owner has been aroused to activity by the action of the State (*State* v. *Humphrey,* 94 Wash. 599), or when it comes as a result of *vis major,* such as an arrest and seizure (*United States* v. *Margolis* (S. D. Cal.), 289 Fed. 161). The facts in the instant case distinctly show that the ouster of Silverman came about as the result of a coercive process of the law, amounting to *vis major,* and hence appellants stand in no different position than they would if their action had been taken in response to a preliminary court order.

(B) The court's duty at the time of hearing

On the date of trial, the landlords, in an effort to defeat further proceedings under Section 22, offered to show what they had done *since the bill was filed* to abate the nuisance. The District Judge refused to consider that as having any connection with the issue on trial, which was whether in fact a nuisance was maintained on the premises in question, according to the allegations of the petition. His ruling was in harmony with Section 22. As if

desiring to forestall just such contentions as made in this case, Congress expressly said "it shall not be necessary for the court to find the property involved was being unlawfully used as aforesaid at the time of the hearing, but on finding that the material allegations of the petition are true, the court shall" do certain things and may do others. Here the court found the allegations of the bill to be true, and appellants in no wise attack that finding. In effect, they argue that the court is to "find" concerning the truth of the petition only in the event it finds against, and only after first hearing the landlord's recital of his lack of knowledge and what he may have done to ameliorate conditions since the Government filed the bill. This not only is contrary to the statute, but it offends orderly procedure. Anything occurring between the time of the filing of the bill and the time of final hearing—whether it be destruction of a still or evacuation by an offending tenant—becomes, as the statute declares, and as the trial court held, immaterial to the basic inquiry, though, of course, the court may consider it as one of the elements for the exercise of its discretion in issuing incidental orders to carry the decree into effect. The thing which the court acts on is the offensive condition of the premises as alleged in the bill when found upon hearing to be true. Upon the condition existing at the time of filing the bill rests the court's jurisdiction to issue the order of abatement and all incidental orders following thereafter.

Appellants say that the court refused to let them show that a nuisance did not exist, but they refer to the time of the hearing. They do not claim that the nuisance alleged in the petition did not exist and did not exist at the time the petition was filed. The statute is based on one thing, their claim on another. The statute does not jump from one set of conditions to another, and neither was the court required to do so. Under the statute, there was, at the time to which it distinctly applies, a nuisance to abate; and the court, having found the requisite facts, was bound to abate it and further to determine how drastic a closing order was necessary to insure the actual abatement.

(C) Responsibility of court to make abatement effective by incidental orders

Thus far the court was under statutory mandate to act, but following the finding of fact that the nuisance as alleged existed, and the issuance of an order that no liquors shall be manufactured, sold, or stored there, the court was bound to decide whether to stop, or to go further into a control of the use of the premises by closing them or exacting a bond for their lawful use. This called for the exercise of a sound discretion.

The statute is silent on how the judge is to formulate that discretion in each case, but, naturally, many facts enter into consideration. Although there is no point raised as to abuse of discretion by the trial court in this case, the basis assumed

for urging a negative reply to the question certified is that where the owner has acted promptly to oust an offending tenant as soon as suit is brought there is no need for the closing order, and Congress could not have intended the court to use it in such cases. But that ignores the real purpose of the closing order, which is *to make the abatement effective.* It may well be that the landlord's ouster of the tenant is not a sufficient guarantee. *Denapolis* v. *United States* (C. C. A. 5th) 3 F. (2d) 722. The facts as certified do not show all the evidence which was before the court with respect to the nature of the nuisance or why it was deemed necessary to issue the closing order. Silverman rented the whole premises, maintaining a grocery store in the larger building and operating a still in the storeroom in the rear. It does not appear from the record whether Silverman was ousted from *all* the premises. The decree only covered the storage building, and the certificate states that the landlords rented the *rear building* to a new tenant for legitimate purposes.

The trial court may have issued the closing order because Silverman remained in close proximity to the premises, where old patrons could still easily and secretly be served. Perhaps the new tenant was not a citizen, or had been convicted of crime, or was a relative, employee, or in some other way connected with Silverman. Ouster of a tenant is but

one of the many steps which may become necessary in a complete abatement of a nuisance. It can not be assumed, as appellants do here, that it alone would be sufficient to insure discontinuance of offensive conditions. The law is concerned with the unlawful use of the *res* which a court of equity is commanded (when the allegations of the bill are found substantially true) to change, and which the court has the additional power of controlling for a period of a year for the purpose of insuring to the public that the offending condition will not be brought back. All of appellants' argument seems to be predicated upon a theory that the congressional purpose of Section 22 was merely to *stop* the offensive use discovered on the property. That is part of the intent of Section 22, but is not all. The object is to stop the discovered nuisance and also to safeguard society from any recurrence of the condition within a reasonable period; and Congress has deemed one year to be such reasonable period during which the court can exact from the owner of the property *increased* responsibility for its lawful use.

Conceivably, if appellants' argument is sound, after the owner was served with the bill of complaint, he could have switched tenants for the storehouse, changed the condition complained of in the bill for a period of thirty to sixty days, and avoided his own liability when the hearing took place. Under such circumstances there would be nothing to

prevent him from permitting the old tenant to re-enter immediately after the termination of the hearing on the bill of complaint. The Government would be obliged then to watch for a second offense and institute suit all over again. Congress undoubtedly had in mind the prevention of such multiplicity of suits when it used the language, "It shall not be necessary for the court to find the property involved was being unlawfully used as aforesaid *at the time of the hearing*" and "the court *may* order that the * * * place shall not be occupied or used for one year thereafter." Thus Section 22 shuts down upon the excuses which the landlord can present as to why the court of equity lacks power to act, limiting him to such showing as he can make of ameliorated conditions *prior to the filing of the bill.* For, having decreed that a *res* harbors an offending condition, it follows, from the language used, that Congress intended the court of equity to exercise its sound discretion to the end that that condition would not only be changed, but that the owner would be compelled to exercise increased vigilance to keep it changed. The court, within its discretion, may either close the premises entirely for a year or less, or exact a bond from the owner by the terms of which he will be made an insurer for the benefit of society against unlawful use of his property. Thus for at least one year the Government could "rest on the owner's bond" and not be

obliged to set a police watch over the property and bring a series of suits to successively oust unwholesome tenants. Congress plainly intended by the language chosen that the court should shift to the owner of the property a share in the duty of keeping nuisances out, either by closing order or by exacting a bond, as the discretion of the court in each case may dictate.

(D) The statute provides relief for owners affected by closing orders

As suggested above, the statute contemplates that the same court which issued the closing order padlocking the premises for a year may lift the burden of such order and permit the premises to be used under a bond guaranteeing increased vigilance to insure lawful use, and providing for payment of all costs, fines, and damages arising from offenses committed thereon. The statute thus offers affirmative relief to owners on whom the closing order falls with heavy financial burden. This relief has been designated by this Court in the *Murphy case* as an "alternative" means of making the abatement effective. It is, however, the only alternative intended to be permitted by Congress, and appellants should have claimed their relief under it. Had they made application to reopen the premises and offered to give bond, the court could then have weighed their good faith, their vigilance, the ouster of the tenant, and the selection of the new lessee against the reputation of the place, the type of

violation conducted thereon, and the probability of its recurrence.

Appellants preferred to rely upon a strained interpretation of the statute, by which if they are successful they may be excused from assuming the obligations of the bond and from exercising continual vigilance over the premises for a year. To compel them to assume these obligations, we maintain, was the plain intent of the statute in furnishing this mode of relief. There is no merit in appellants' contention. It urges a construction of Section 22, which would multiply the difficulties of the Government's efforts to change the use of premises where maintenance of a nuisance had become a fixed community tradition and habit, would lead to a multiplicity of suits, would evade the intent to make the owner of the premises a partner with the Government in the responsibility for the discontinuance of an offensive use once the fact of that use has been established, would offend the ancient rule by which a court of equity has the power to make effective its decrees, and would be a tortured construction of the plain words which Congress used. Congress provided an avenue of escape from the burden of this closing order if appellants wish to avail themselves of it. Failing to take that step, we can only assume that they were unwilling to submit to the discretion of the trial court and assume the responsibility for the kind of vigilance over the property which the statute provides.

III

Legislative history and authorities support a literal interpretation of the statute

(A) Legislative history

The reports of the committees of the Senate and House having the bill in charge indicate that Congress intended the words used to have the meaning contended for by the Government. When H. R. 6810 (which afterwards became the National Prohibition Act) was reported by the House Judiciary Committee, it was stated (House Reports No. 91, Part I, June 30, 1919, on page 7):

> Title II for the enforcement of the Eighteenth Amendment has in it no new or supplemental feature. Every provision in it has precedents in State or Federal legislation.

The precise precedents found in state legislation and considered in framing Section 22 are enumerated in a memorandum accompanying Report No. 151 of the Senate Judiciary Committee, to accompany H. R. 6810, which on page 17 states:

> The following States have laws providing for injunction proceedings: Alabama (secs. 19 and 20 of acts of 1915); Arkansas (sec. 12 of act of 1917); California (sec. 6 of prohibition law); Georgia (sec. 4 of act of 1916); Indiana (sec. 21 of prohibition act, effective 1918); Iowa (secs. 2405–2410); Michigan (sec. 1, nuisance act); Mississippi (sec. 22 of law enforcement act of 1916); Montana (sec. 6, ch. 143); Nebraska (secs. 28 to 34 of act effective May 1, 1917); North Dakota (secs.

9373–9374); Oregon (sec. 22, general laws of 1915); South Carolina (sec. 819); South Dakota (sec. 65, act of 1917); Tennessee (nuisance laws, chs. 1 and 2); Utah (secs. 10–13, act 1917); Virginia (sec. 34, prohibition act); West Virginia (sec. 17).

These laws are set out in the appendix to this brief.

To avoid the creation of any new or experimental features in the National Prohibition Act, Congress undoubtedly adopted the features of the above-considered statutes, which, in the experience of the States, had proved sound. Likewise it rejected some of their features which either had proved impracticable or which Congress considered might prove impracticable. What Congress intended, therefore, may be shown by the parts of state legislation it adopted; what was not intended should be apparent from the features which it did not adopt.

Some of the state statutes contained specific provisions for the protection of a landlord against a closure order under conditions similar to those involved in this case, viz:

(I) In California (c. 132, Sec. 3, Stats. 1915, p. 237) a temporary injunction is allowed only when the court is satisfied that the owner has received written notice of the existence of the nuisance at least two weeks prior to the filing of the complaint.

(II) In North Dakota (Sec. 9373, R. C. 1905, when leasehold premises are adjudged to be a nuisance, the owner shall have the

right to terminate the lease by giving three days' notice to the tenant, and when this is done the premises shall be turned over to the owner upon order of the court.

(III) In Oregon (c. 141, Sec. 19, Gen. Laws 1915, p. 160) anyone who, after being notified in writing, omits to take all proper measures either to abate the nuisance or, failing therein, to eject therefrom persons so using the property shall be deemed guilty of assisting in the maintaining of such nuisance.

(IV) In Utah (c. 2, Sec. 11, Laws 1917, p. 9, procedure for abatement shall be as provided in c. 99, Sec. 2, Laws 1913, p. 189) when the owner is not in actual possession, he shall have notice of the nuisance and a reasonable time to abate it.

Had Congress intended that the owner of the property should have an opportunity to eject the offending tenant and that such ejectment, when accomplished before a final hearing, should of itself constitute an abatement of the nuisance so as to preclude further action by the court, undoubtedly provisions similar to and equally explicit with the provisions of the state statutes above referred to would have been incorporated in Section 22. Since no language even remotely resembling them was used, it must follow that their meaning was not intended by Congress. And on the contrary, Congress evidently followed those precedents which not only made no provision for abatement by a

landlord, but which contained a specific provision for release on bond, as in the Iowa statutes.

Appellants rely upon the construction placed on Section 22 in *United States* v. *Schwartz* (Mass.), 1 F. (2d) 718, wherein the court held that the nuisance statutes of Massachusetts furnish an analogy for the construction of Section 22, and it accordingly construed Section 22 as though it contained the same provisions as the general laws of Massachusetts, 1921, c. 139, Secs. 4–11. The Massachusets Act provides that the owner becomes a contributing factor in the nuisance when—and only when—he has had an opportunity to repossess himself of his property and has failed to do so. The analogy is inapplicable, first, because the Massachusetts statute was enacted subsequent to the National Prohibition Act, and, second, because Congress had considered identical legislation in the statutes of California, North Dakota, Oregon, and Utah and had apparently refused to follow precedents therein contained.

Furthermore, striking evidence that Section 22 did not contemplate conditions at the time of hearing is found in the memorandum accompanying Senate Report No. 151 (*supra*) which, on page 17, states:

> The provision stating it shall not be necessary to prove that the place is being unlawfully conducted at the time of the hearing is not a new one. Section 17 of the West Vir-

ginia law has in it the same provision. It reads as follows:

"It shall not be necessary for the court to find that the premises involved were being unlawfully used as aforesaid at the time of the hearing, but on finding that the material allegations of the bill are true the court shall order, etc."

This provision aids prosecuting officers in the trial of cases against the plea of liquor dealers' attorneys that they have ceased to operate the liquor nuisance, and by this means they sometimes defeat the application of the writ.

(B) Judicial construction

Appellants assail the power of the court to abate the nuisance, asserting as obstacles to the exercise of that power (1) that they had no knowledge of the alleged violation by the tenant, and (2) that upon discovery thereof, after service of the Government's process, they ejected him. Their contentions in both of these respects have been foreclosed by decisions of both the Federal and the State courts.

When Congress adopts a state statute substantially as it exists in the legislation of the State, it adopts also the known and settled construction given that statute by the courts of that State. *Willis* v. *Eastern Trust and Banking Company*, 169 U. S. 295, 307; *Capital Traction Company* v. *Hof*, 174 U. S. 1, 36. According to the settled construction in the States where equitable remedies against liquor nuisances have been in force and these reme-

dies are not restricted by peculiar legislation making knowledge a necessary element to the exercise of the remedy, it is settled that want of knowledge on the part of the owner is immaterial and does not affect the right of the sovereign to abate the nuisance. *State ex rel. Dow* v. *Nichols,* 83 Wash. 676 *People ex rel. Bradford* v. *Barbiere,* 33 Cal. App. 770; *Martin* v. *Blattner,* 68 Iowa 286; *State* v. *Knapp,* 178 Iowa 25; *State* v. *Clark,* 189 Iowa 492; *State ex rel. Seeburger* v. *Deemey* (not yet officially reported), 210 N. W. 909. Even in absence of the statutory remedy want of knowledge can not affect the inherent powers of a court of equity to abate a nuisance. *State ex rel. Kern* v. *Emerson,* 90 Wash. 565.

In commenting upon a Kansas nuisance statute, this Court, in *Van Oster* v. *Kansas,* 272 U. S. 465, 467, said:

> It is not unknown or indeed uncommon for the law to visit upon the owner of the property the unpleasant consequences of the unauthorized action of one to whom he has entrusted it. Much of the jurisdiction in admiralty, so much of the statute and common law of liens as enables a mere bailee to subject the bailed property to a lien, the power of a vendor of chattels in possession to sell and convey good title to a stranger, are familiar examples. They have their counterpart in legislation imposing liability on owners of vehicles for the negligent operation by those entrusted with their use,

> regardless of a master-servant relation. Laws of New York, 1924, c. 534; Michigan Pub. Acts, 1915; Act. No. 302, Sec. 29 (constitutionality upheld, *Stapleton* v. *Independent Brewing Co.*, 198 Mich. 170). They suggest that certain uses of property may be regarded so undesirable that the owner surrenders his control at his peril. The law thus builds a secondary defense against a forbidden use and precludes evasions by dispensing with the necessity of judicial inquiry as to collusion between the wrongdoers and the alleged innocent owner.

See also *Goldsmith-Grant Co.* v. *United States*, 254 U. S. 505.

Among the lower Federal courts which have considered this question under Section 22, the weight of opinion is that want of knowledge on the part of the landlord does not affect the power of the court. *United States* v. *Boynton* (E. D. Mich.), 297 Fed. 261, 267; *United States* v. *Studio Club* (S. D. N. Y.), 12 F. (2d) 462; *United States* v. *Archibold* (S. D. N. Y.), 4 F. (2d) 587; contra, see *United States* v. *Schwartz* (Mass.), 1 F. (2d) 718.

But it was contended (Cert. p. 2), though apparently abandoned in the brief before this Court, that the provisions of Section 21, putting a lien for costs and fines on the premises only when the owner had knowledge or reason to believe that the building was being unlawfully used, should be read over into Section 22 as applying there as well, and that in view of the restriction in Section 21 Congress could

not have intended to subject owners to greater financial burden and more complete forfeiture by enforced disuse of valuable property by such closing order as here made under Section 22. This argument overlooks the marked differences in the purposes of Sections 21 and 22. The former is penal and attaches a lien to the *res* on account of the criminal liability of the owner or some one else. The purpose of the latter is prevention. It is true that in some instances when comparing extreme cases a closing order for a year issued under Section 22 may result in more pecuniary loss to the owner than it would to have a lien placed on his property for a small fine imposed upon a bartender who kept a nuisance there. Nevertheless, in the eye of the law it is quite a different thing to attach a *prohibition on the use of property* than to impose a lien for the satisfaction of which the property may be sold. In the latter instance the ownership or seizin is jeopardized. In the former the enjoyment merely is disturbed. In the one case property would be taken without due process of law; in the other taking of property in the constitutional sense is not involved, although pecuniary loss may result from the court's decree.

In *State ex rel Seeberger* v. *Deemey,* 210 N. W. 909, and in *State ex rel. Seeberger* v. *James,* 211 N. W. 372 (neither decision being yet officially reported), the Supreme Court of Iowa decided against contentions similar to the ones here urged

which arose under almost identical facts. Though the decisions come too late to bring them within the rule that Congress adopted them as a rule of construction for Section 22, they are persuasive as construction of analogous legislation.

The precise question here involved was considered in *Schlieder* v. *United States* (C. C. A., 5th), 11 F. (2d) 345, 347, wherein the court said:

> It is the contention of the appellants that the property of an innocent owner can not be ordered closed after the ejectment of the tenant and the abatement of the nuisance. There would be much force in this contention if it were not for the provision allowing the owner to bond the injunction. This is a reasonable requirement as a guaranty of good faith, and to insure that the property will not again become a nuisance, for a period sufficient for it to lose its character and reputation as a place where liquor may be purchased. This provision affords ample protection to an innocent owner.

IV

Literally construed, section 22 is not an unconstitutional exercise of legislative power

Appellants, relying upon their construction of Section 22, say that no constitutional question is involved. The Government, urging that the first question be answered in the affirmative, accordingly contends that this construction does not make the statute unconstitutional.

Ever since *Mugler* v. *Kansas,* 123 U. S. 623, 668, 669, it has been regarded as settled that the mode of abatement now provided in Section 22 is not unconstitutional, either as denying a jury trial or as taking property for public use without compensation, or as denying due process. Nor is it in excess of the legislative power to call into operation all the powers of a court of chancery to suppress the liquor traffic. *Eilenbecker* v. *Plymouth County,* 134 U. S. 31, 40.

Whatever means are reasonably necessary to abate such a nuisance, even to the extent of taking or destroying the property of an innocent owner, may be adopted without infringing any constitutional rights. *Mugler* v. *Kansas, Supra; Lawton* v. *Steele,* 152 U. S. 133; *Northwest Laundry Co.* v. *Des Moines,* 239 U. S. 486; *United States* v. *Boynton,* 297 Fed. 261, 266.

In testing whether the statute goes beyond the reasonable demands of the occasion, it must first be conceded that the largest legislative discretion is allowed in determining not only what the public interests require, but also what measures are necessary for the protection of such interests. *Stone* v. *Mississippi,* 101 U. S. 814, 819. Congress may adopt not only means that are necessary, but those that are convenient to the exercise of its power. *United States* v. *Hoke,* 227 U. S. 309. Under this doctrine Congress has the power to retain control of the premises, through the courts, long enough to

make sure of the abatement. Allowing a year for this purpose is not unreasonable. *Murphy* v. *United States, supra.*

When Congress dispensed with the necessity of inquiry as to collusion between the wrongdoer and the alleged innocent owner, it was well within its power. *Van Oster* v. *Kansas, supra.*

"Having regard to the artifices which are used to promote the sale of intoxicants" (*Purity Extract and Tonic Co.* v. *Lynch, supra,* p. 205), and considering the possibility that violations can readily continue on the premises though the property be in the hands of a new tenant (*Silz* v. *Hesterberg,* 211 U. S. 31, 40), it can not be said that the statute "passes the bounds of reason and assumes the character of a merely arbitrary fiat."

Under the doctrine of *Mugler* v. *Kansas, supra,* Congress has the power to abate a liquor nuisance. But that power without an effective means of enforcement would be bare indeed. Closure of the premises after the offending tenant has been lodged in jail has always been considered reasonable and needful to render the power of abatement effective, for otherwise there would be no need of equity to supplement the criminal law. The same may be said of closure after the seizure of the stock in trade. It is difficult to see how the ejectment of the tenant at the hands of the landlord would render closure by the court any more unreasonable or unnecessary, especially in view of the rule that equity

seeks not a temporary stoppage but a permanent abatement.

The principles stated in *Goldsmith-Grant Co.* v. *United States,* supra, may have a bearing here.

And if Congress may constitutionally adopt such measures as are reasonable, appropriate, and needful to render effective the exercise of such powers, it may require the owner of property to do more than merely oust his tenant *pendente lite.* It may require an owner who has already failed to discharge his common-law duty of keeping his property from becoming a nuisance (*Moore* v. *State,* 107 Tex. 490, 495) to give security that he will not again permit it to be used unlawfully for the period of one year.

CONCLUSION

It is respectfully submitted that each question certified should be answered in the affirmative.

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